No. 13934

United States
Court of Appeals
for the Ninth Circuit

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska, Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12/3/53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

SEABORN J. BUCKALEW,
United States Attorney,

LYNN W. KIRKLAND,
Assistant United States Attorney,

Attorneys for Plaintiff.

McCUTCHEON, NESBETT & RADER,
P. O. Box 2257,
Anchorage, Alaska,

Attorneys for Defendant.

In the District Court for the Territory of Alaska, Third Division

Criminal No. 2779

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DON MAURICE RANDELL,

Defendant.

INDICTMENT

(Section 65-4-22, ACLA, 1949)

The Grand Jury charges:

That on or about the 16th day of July, 1952, at a place known as Keith & Clara's, on the Seward Highway, near Anchorage, Third Judicial Division, Territory of Alaska, the said Don Maurice Randall, being then and there armed with a dangerous weapon, to wit, a revolver, did then and there assault one Paul Abernathy by pointing said gun at the said Paul Abernathy and threatening to do him bodily harm if a drink of intoxicating liquor was not served to the said Paul Abernathy and his companion.

A True Bill:

/s/ JERRY HOLA,
Foreman.

/s/ LYNN W. KIRKLAND,
Asst. United States Attorney.

Witnesses examined before the grand jury:

Patricia Herrick,

Paul Abernathy.

[Endorsed]: Filed November 19, 1952.

Walter Scott Brown, M.D.
William E. Lacy, Jr., M.D.
505 Ninth Avenue
Seattle 4

February 2, 1953.

Stanley McCutcheon,
Attorney at Law,
Anchorage, Alaska.

Dear Mr. McCutcheon:

Don Randall was severely injured on January 23, 1953, as a result of an automobile accident.

He has multiple, severe facial lacerations and a back injury which complicates his condition, and it is felt that it will be at least four weeks before he will be able to return to Alaska.

Respectfully yours,

/s/ W. S. BROWN,
W. S. BROWN, M.D.

WSB:bjm

[Endorsed]: Filed February 5, 1953.

[Title of District Court and Cause.]

MOTION

Comes now counsel for the defendant in the above-captioned criminal action and respectfully moves the Court for an indefinite continuance of the time of trial of said action.

This motion is based on the affidavit of Walter Scott Brown, M.D.

Dated at Anchorage, Alaska, this 24th day of February, 1953.

McCUTCHEON, NESBETT & RADER,

/s/ STANLEY J. McCUTCHEON,
Attorneys for Defendant.

Walter Scott Brown, M.D.
505 Ninth Avenue
Seattle 4

February 17, 1953

Stanley McCutcheon,
Attorney at Law,
Anchorage, Alaska.

Dear Mr. McCutcheon:

Don Randall, as you know, was injured severely in an automobile accident on January 23, 1953, and is still suffering from the effects of the lacerations of his face, ear and in addition post brain concussion with severe headaches and occasional fainting spells.

He has an appointment on February 17th with a neurologist to verify just how severe this post concussion complex is. It is my impression that in view of the symptoms he has suffered a great deal more brain damage than is evident.

He returned to Alaska against my advice and without apparent reason inasmuch as he was fully aware of the seriousness of his condition and in addition to his lack of mental acumen he has now developed a tendency toward forgetfulness.

From my observation of this patient, I am sure he is in no mental state to carry on business affairs to any degree of safety and I am sure the neurologist examination will reveal the extent of his ceberal damage.

Very sincerely yours,

/s/ W. S. BROWN,
W. S. BROWN, M.D.

WSB:bjm

Subscribed and sworn to before me this 19th day of February, 1953.

[Seal]: /s/ WM. L. THULL,
Notary Public in and for the State of Washington, residing at Seattle.

Service of copy acknowledged.

[Endorsed]: Filed February 24, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR INDEFINITE CONTINUANCE

Now, at this time, hearing on motion for indefinite continuance in cause No. 2779 Cr., entitled United States of America, plaintiff, versus Don Maurice Randell, defendant, came on regularly before the Court, Seaborn J. Buckalew, United States Attorney present for and in behalf of the Government, Stanley J. McCutcheon, of counsel for defendant, the following proceedings were had to wit:

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the defendant.

Whereupon, Court denied motion on ground affidavit is insufficient.

Entered Feb. 27, 1953.

[Title of District Court and Cause.]

MOTION

Comes now counsel for the defendant in the above-captioned criminal action and respectfully moves the Court for a continuance of fifteen days from date hereof of the time of trial of said action.

This motion is based on the statement of Richard O. Sellers, M.D., attached hereto.

Dated at Anchorage, Alaska, this 4th day of March, 1953.

McCUTCHEON, NESBETT & RADER,

/s/ STANLEY McCUTCHEON,
Attorneys for Defendant.

Richard O. Sellers, M.D.
P. O. Box 110
Seward, Alaska

March 3, 1953.

To Whom it may concern:

Don Randall, who has been previously under my care for the past year was seen by me on March 2, 1953, complaining of marked nervousness, anxiety and apprehension. Upon examination, I found his distress considerably more pronounced than upon any previous visit. History reveals an injury to his head sustained in a car accident on January 29, 1953, while driving near Spokane, Washington.

I feel that his condition at present requires considerable rest and that he should refrain from any excitement, stress or strain which could increase his disability necessitating much care and hospitalization.

/s/ R. O. SELLERS, M.D.,
R. O. SELLERS, M.D.

[Endorsed]: Filed March 4, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF STANLEY McCUTCHEON

United States of America,
Territory of Alaska—ss.

Comes now Stanley McCutcheon, attorney for the above defendant, and being first duly sworn, on oath, deposes and says:

That on the 23rd of January, 1953, at Seattle, Washington, defendant was seriously injured while riding as a passenger in an automobile;

That he was taken to the Walter Scott Brown Clinic at 505 Ninth Avenue, Seattle Washington, for treatment. That Dr. Brown advised affiant that the defendant suffered multiple lacerations and deep cuts of the face and ear necessitating the taking of over one hundred sutures;

That in addition to serious cuts and bruises, affiant is informed by Dr. Brown that defendant is suffering a serious post brain concussion resulting in headaches and fainting spells.

Affiant further states that defendant has been advised by his doctor not to engage in any business activities nor to undergo any activity whatsoever that will bring on a feeling of stress or excitement. That defendant's doctors have warned that to do so may seriously and permanently impair his health.

Affiant is advised by defendant's doctors that defendant evidences, as a result of his injuries, lack of mental acumen and has developed a tendency toward loss of memory.

Affiant says further that he counseled defendant in connection with the above criminal action prior to defendant's injuries and defendant was clear in memory of certain facts important to his defense. That affiant has recently counseled defendant with reference to facts of his case and finds that the defendant is unable to remember matters that were heretofore clearly remembered by defendant all important to his defense.

Affiant further states on information of defendant's doctors that rest and quiet will improve defendant's general health and that his normal memory will likely be restored.

Affiant states further that to try the defendant on the 5th of March, 1953, will be unfair to the defendant because of his ill health.

/s/ STANLEY McCUTCHEON.

Subscribed and Sworn to before me this 4th day of March, 1953.

[Seal] /s/ HATTIE W. VERMILYEN,
Notary Public in and for
Alaska.

My commission expires 3-9-55.

[Endorsed]: Filed March 4, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR CONTINUANCE

Now at this time hearing on motion for continuance in Cause No. 2779 Cr., entitled United States of America, plaintiff, versus Don Maurice Randall, defendant, came on regularly before the Court, Seaborn J. Buckalew, United States Attorney, present for and in behalf of the Government, defendant not present, but represented by Stanley J. McCutcheon, of his counsel, the following proceedings were had, to wit:

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the defendant.

Now at this time Court continued cause to 1:45 o'clock p.m. this date.

Entered March 4, 1953.

[Title of District Court and Cause.]

HEARING ON MOTION FOR CONTINUANCE (Continued)

Now at this time came the respective counsel as heretofore and the hearing on motion for continuance in Cause No. 2779 Cr., entitled United States of America, plaintiff, versus Don Maurice Randell, defendant, was resumed.

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the defendant.

Motion denied for insufficiency of affidavit.

Entered March 4, 1953.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION TO JURY No. 1

An unloaded gun is not a dangerous weapon when used only as a firearm. The pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a dangerous weapon, and cannot sustain a conviction for such an assault for want of

present ability to commit a violent injury on the person threatened in the manner attempted, and this, too, regardless of whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear.

74 ALR 1206

Price v. U. S., 156 F. 950

People v. Bennett, 173 P. 1004

People v. Sylva, 76 P. 814

[Endorsed]: Filed March 5, 1953.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTION TO JURY No. 2

You are instructed but whether the person at whom the gun was pointed believed it to be loaded is not to be considered in determining the guilt or innocence of the defendant.

[Endorsed]: Filed March 5, 1953.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

The indictment in this case charges the defendant with the crime of assault with a dangerous weapon, alleged to have been committed on or about July 16,

1952, near Anchorage, upon Paul Abernathy, by pointing a gun at him and threatening him with bodily harm.

The law of Alaska defines the crime charged as follows:

> "That whoever being armed with a dangerous weapon shall assault another with such weapon, shall be punished."

An assault with a dangerous weapon is an unlawful offer, coupled with present ability, to injure another with such weapon. Any pointing of a loaded gun at or toward another in a menacing and threatening manner is sufficient to constitute an assault with a dangerous weapon.

In this connection, you are instructed that a loaded revolver is a dangerous weapon. Whether it was loaded at the time charged may be inferred from the surrounding facts and circumstances, but whether the facts and circumstances proved are such as to warrant such an inference, is for you to say.

No. 2

The essential elements of the crime charged, each of which must be proved beyond a reasonable doubt before the defendant may be convicted, are:

(1) An assault, and

(2) With a dangerous weapon

It is undisputed that the crime, if committed, was committed at or about the time and place charged. Therefore, if you find from the evidence beyond a reasonable doubt that at or about the time and place

charged, the defendant made an assault with a loaded revolver upon Paul Abernathy by pointing it at or toward the said Abernathy in a threatening or menacing manner, you should find him guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.

No. 3

Included in the crime charged in the indictment is the crime of simple assault.

Simple assault is defined as:

> "Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, shall be punished."

Therefore, if you find that the revolver was not loaded but do find from the evidence beyond a reasonable doubt that the defendant unlawfully or in a threatening or menacing manner, pointed said revolver at or toward the said Abernathy and that the said Abernathy did not know that it was not loaded and was thereby put in fear and apprehension of injury, you should find the defendant guilty. But if you do not so find or have a reasonable doubt thereof, you should acquit him.

You are also instructed that if you find that an assault was committed but are in doubt whether it was an assault with a dangerous weapon or merely simple assault, you should convict the defendant of the lower grade of offense, that of simple assault.

No. 4

The law presumes every person charged with crime to be innocent and, hence, the defendant is

entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment.

No. 5

The burden of proving the offense charged beyond a reasonable doubt is on the prosecution. Whether this burden of proof is sustained is to be determined by you from all the evidence in the case, and not merely from the evidence introduced on behalf of the prosecution.

No. 6

A reasonable doubt is not just any vague, fanciful or imaginary doubt, but one that arises after a careful consideration of all the evidence or from a lack thereof. It is a doubt based on reason, and not on a bare possibility of innocence, or on sympathy or a desire to escape from an unpleasant duty. Everything relating to human affairs and depending on human testimony is open to some possible doubt, and this is true of guilt.

If after carefully analyzing, comparing and weighing all the evidence, you have a settled conviction or belief of defendant's guilt, amounting to a moral certainty, such as you would be willing to act upon in matters of the highest importance relating to your own affairs, then you have no reasonable doubt.

No. 7

Subject to the law as contained in these instructions you are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. Evidence includes not only all the facts testified to or established by the exhibits, but also all reasonable inferences which may be deduced therefrom. What facts have been proved and what inferences may be deduced therefrom is for you to determine. The term "witnesses" as used in this instruction includes the defendant.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should beviewed with distrust.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor

one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides, and that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case.

In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair or evasive, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, his character as shown by the evidence, the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on his credibility and the weight of his testimony.

A witness may be impeached by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. A witness may also be impeached by evidence that at other times he has made

statements inconsistent with his present testimony as to any matter material to this case; or by proof that he has been convicted of a crime. However, the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine. A witness wilfully false in one part of his testimony may be distrusted in other parts. Discrepancies in a witness' testimony or between his testimony and that of other witnesses, if any, do not necessarily mean that the witness should be discredited. Failure of or a mistaken recollection is a common experience. It is a fact, also that two persons witnessing an incident or a transaction rarely agree on the details especially with regard to time, distance, etc. You should not, therefore, be misled by discrepancies in unimportant matters or in testimony which is immaterial to the question of guilt or innocence. But a wilful falsehood always is a matter of importance and should be seriously considered. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should apply the tests stated and give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact merely because a witness has stated it to be a fact, but you are to determine the fact by applying the tests stated in this instruction. And where wit-

nesses directly contradict each other on any material matter, and are the only ones who have testified thereto, you are not to consider the evidence evenly balanced or such matter not proved but you should ask yourselves what motive the one had for testifying as he did, and what motive the other had for testifying to the opposite, and after applying the tests referred to and considering all the evidence, determine whom to believe.

Finally, you may, in determining any question, resort to the sound common sense and experience which you use in the ordinary affairs of life. Also, in addition to drawing inferences and conclusions from the evidence you may consider such matters of common knowledge as are not disputable.

No. 8

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions.

No. 9

I also instruct you that you should not concern yourselves with the matter of punishment. That is the exclusive concern of the Court. You are not responsible for the consequences of your verdict but only for its truth so far as the truth is determinable by you. When you have arrived at a verdict in accordance with these instructions, you need not sub-

mit to any questioning as to how you reached your verdict or what occurred in the jury room except in a proper proceeding in this court.

No. 10

Jurors are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so, so that there may be an end to litigation. In each case the verdict must be unanimous. But while the verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference and discussion in the jury room. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors. The very object of the jury system is to secure unaniminity by a comparison of the views of, and by discussion and argument among, the jurors, themselves. Hence, while no juror should yield a sincere conviction founded upon the evidence and the law as laid down in these instructions merely to agree with the jury, every juror, in considering the case with fellow jurors, should lay aside all undue pride and vanity of personal opinion and listen, with a disposition to be convinced, to the opinions and arguments of the others and a desire to get at the truth in order that a just verdict, representing the judgment of the entire jury, may be reached.

Accordingly, no juror should hesitate to change the opinion he has entertained or expressed, if hon-

estly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

No. 11

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

No. 12

Upon retiring to your jury room you will select one of your number foreman, who will preside over your deliberations and be your spokesman in court.

You will take with you to the jury these instructions, the exhibits, together with three forms of verdict, which are self-explanatory.

I you unanimously agree upon a verdict during

business hours, that is between 9 a.m. and 5 p.m., you should have your foreman fill in, date and sign it and then return with your verdict immediately into open court, together with these instructions and the unused forms of verdict. If, however, you do not agree upon a verdict until after 5 p.m. one day and before 9 a.m. the following day, the verdict, after being similarly filled in, dated and signed, must be sealed in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the Court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

If it becomes necessary during your deliberations to communicate with the Court, you may do so by having the bailiff deliver a written message to the Court, but you must not in such message or otherwise reveal to the Court or any person how the jury stands on the question of guilt or innocence.

Given at Anchorage, Alaska, this 5th day of March, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, find the defendant guilty of assault with a dangerous weapon as charged in the indictment.

Dated at Anchorage, Alaska, this 5th day of March, 1953.

/s/ ANTHONY SCHNABEL, JR.,
Foreman.

[Endorsed]: Filed March 6, 1953.

Entered March 6, 1953.

In the District Court for the Territory of Alaska, Third Division

Criminal No. 2779

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DON MAURICE RANDALL,

Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 13th day of March, 1953, came Seaborn J. Buckalew, United States Attorney, the attorney for the Government, and the defendant, Don Maurice Randall, appeared in person and by his counsel, Stanley J. McCutcheon, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of assault with a dangerous weapon as charged in the Indictment on file herein:

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant, Don Maurice Randall, is guilty as charged and convicted.

It Is Adjudged that the defendant, Don Maurice Randall, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) and One-half (½) years, said sentence to commence and begin on the 13th day of March, 1953, and that said defendant stand committed until said sentence is served.

It Is Ordered that the Clerk deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court at Anchorage, Alaska, this 18th day of March, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1953.

Entered March 18, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant: Don Maurice Randall, Kenai, Alaska.

Appellant's Attorney: Stanley J. McCutcheon; McCutcheon, Nesbett & Rader, Anchorage, Alaska.

Offense: Assault with a Dangerous Weapon.

Judgment: On the 13th day of March, 1953, the appellant, Don Maurice Randall, was convicted upon his plea of not guilty and a verdict of guilty of the offense of Assault with a Dangerous Weapon as charged in the Indictment filed herein, and was committed for imprisonment for a period of Two (2) and One-half (½) years, said sentence to commence and begin on the 13th day of March, 1953, and the defendant is to stand committed until said sentence is served.

Institution where now confined: Federal Jail at Anchorage, Alaska.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Anchorage, Alaska, this 19th day of March, 1953.

/s/ DON M. RANDALL,
Appellant.

[Endorsed]: Filed March 19, 1953.

[Title of District Court and Cause.]

ORDER OF DISTRICT COURT GRANTING EXTENSION OF TIME FOR FILING RECORD

This cause came on for hearing on the motion of the defendant, by and through his attorneys, McCutcheon, Nesbett & Rader, to extend the time for filing the record on appeal to the Court of Appeals for the Ninth Circuit, and good cause appearing for such extension, it is

Ordered that the time for filing the record on appeal and docketing the appeal herein be and the same hereby is extended to and including August 1, 1953.

Dated at Anchorage, Alaska, this 21st day of April, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 21, 1953.

In the United States District Court for the District of Alaska, Third Division

No. 2779 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DON MAURICE RANDALL,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable George W. Folta,
United States District Judge.

March 5, 1953—10:00 A.M.

Appearances:

For the Plaintiff:

SEABORN J. BUCKALEW,
United States Attorney;

LYNN W. KIRKLAND,
Assistant U. S. Attorney,
Third Division, Territory of Alaska,

For the Defendant:

STANLEY J. McCUTCHEON,
Attorney for Defendant.

DON MAURICE RANDALL,
Defendant in Person.

The Court: The parties ready in the case of United States vs. Randall?

Mr. Buckalew: The United States is ready.

Mr. McCutcheon: May we approach the bench and be heard on that? The defendant is not ready for trial for the reasons stated in the Doctor's affidavit, the affidavit of Walter Scott Brown and the affidavit of Dr. Richard Sellers of Seward, and at this time we renew our request for a 15-day continuance.

The Court: The motion is denied. You may proceed to empanel the jury.

Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit

jurors, and counsel for both plaintiff and defendant examined and exercised their challenges against said jurors, until the jury of twelve jurors was complete, and counsel for plaintiff and counsel for defendant stipulated that a verdict of less than twelve jurors may be received in case of illness, disability, or other good cause for excusing one of the jurors, and that it is therefore unnecessary to draw the names of alternate jurors in the cause. Whereupon, said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the [3*] instructions of the Court, and the Court indicated the trial should then proceed.

The Court: According to the record here the defendant has never been arraigned or pleaded; is that correct?

Mr. Buckalew: I have a note on my file that he was arraigned. Perhaps it is an erroneous notation, nothing here in the file to indicate it.

Deputy Clerk: What date?

Mr. Buckalew: That is in the Commissioner's Court.

The Court: The defendant will be arraigned.

Deputy Clerk: Does the defendant waive reading of the indictment?

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(The defendant was thereupon duly arraigned upon the indictment and furnished with a copy thereof.)

Mr. McCutcheon: Yes, ma'am.

The Court: What is your plea—guilty or not guilty?

The Defendant: Not guilty.

The Court: That will be all. You may make your opening statement.

(Opening statement to the jury was made by Seaborn J. Buckalew, United States Attorney, on behalf of the plaintiff.)

(Opening statement to the jury was made by Stanley J. McCutcheon on behalf of the defendant.) [4]

DAVID E. THOMPSON

called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. David E. Thompson.

Q. You a resident of Anchorage?

A. South of Anchorage on the Johns Road.

Q. You live out near Keith and Clara's place?

A. About a mile and a half.

Q. Were you in Keith and Clara's establishment on the 16th day of July, 1952? A. I was.

(Testimony of David E. Thompson.)

Q. Do you recall about what time of the day it was?

A. It was around 7:00 o'clock in the evening.

Q. Did you see the defendant come into Keith and Clara's? A. I did.

Q. Will you tell the jury what happened from the time he came in until this alleged assault took place?

A. He walked in through the door with a blonde-headed woman, walked up to the table with some other people—where some other people were seated, and talked with them a little bit and talking in a kind of a loud voice, and from there he [5] come over to the bar and ordered a drink and while they were drinking, just drinking the first order, he and this blonde-headed woman were arguing about some money that she owed him and something about the title of a car, and then he ordered a double shot for her and was going to make her drink it and she tried to beg off on this double shot. They turned and walked away from the bar and walked over to a table along the wall, the front wall, and he kept trying to force her to drink this drink and she says, "Just give me time, give me time, I'll make it." And after they drank this drink they walked outside and got into an argument out there, which I couldn't hear, could see trouble going on. She came back in crying, said "Just leave me alone, just leave me alone." She walked over to a table at the south end of the building and sat down and

(Testimony of David E. Thompson.)

evidently it quieted their nerves and she says, "I need a drink." She got up and walked over towards the bar. The defendant followed her. He was standing between me and the lady and he asked the bartender for a drink and the bartender said "No, she has had enough." He said, "Are you going to give her a drink, or do I have to whip you?" The bartender said "No, she has had enough." He reached in under his belt on his left hand and pulled out a gun. I watched it when it came out and I could see very plainly what kind of a gun it was. [6]

Q. Excuse me, were you sitting next to him?

A. I was sitting on his left-hand side.

Q. Go ahead. Excuse me.

A. I could see very plainly that he pulled the gun, what kind of a gun it was, and he pulled it like that (indicating) and said "Give her a drink." The bartender put up his hands and served the drink.

Q. Did you think the gun was loaded?

A. As near as I could possibly see, the clip was in it and ready for action. I watched that particularly because I figured on getting that gun myself if there was any possible chance.

Q. You figure the gun was armed and ready to fire?

A. Absolutely; if it hadn't been I would have tried to get it.

Q. Are you the gentleman that called the Highway Patrol? A. I am.

(Testimony of David E. Thompson.)

Q. Is there a telephone at Keith and Clara's?

A. No, I went to Fireweed and East G, Potter Road, to make the call.

Mr. Buckalew: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. Did you see any shells in the gun? [7]

A. There was no possible way you could see any shells in an automatic when the clip is in it.

Q. Just a normal looking automatic, wasn't it?

A. Yes, sir.

Q. No possible way for you to tell whether or not it was loaded from where you were standing?

A. Other than the fact that the clip was in it.

Q. Now, did you talk to the United States Attorney about whether or not the gun was loaded prior to coming into this courtroom? A. Sir?

Q. I repeat the question. Did you talk to the United States Attorney prior to coming into this courtroom about whether or not the gun was loaded?

A. Yes.

Mr. McCutcheon: No further questions.

Redirect Examination

By Mr. Buckalew:

Q. Mr. Thompson, what caliber weapon did you think it was?

A. It looked to me like a 25-caliber.

Mr. Buckalew: I do not have any more [8] questions.

(Testimony of David E. Thompson.)

Recross-Examination

By Mr. McCutcheon:

Q. Did you know that the blonde woman was Mrs. Randall?

A. I had no idea who she was. I had never seen her before.

Mr. McCutcheon: No more questions.

(The witness thereupon withdrew from the witness chair.)

Mr. Buckalew: Do you want the witness to stay around, Mr. McCutcheon?

Mr. McCutcheon: Yes, I do. I would like to have all Government witnesses stay here.

The Court: All witnesses then will remain in attendance unless they apply for excuse and are excused.

Mr. Buckalew: Call Patricia Ann Herrick.

PATRICIA ANN HERRICK

called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. Patricia Ann Herrick.

Q. Your mother and father run Keith and Clara's place? A. Yes, they do. [9]

(Testimony of Patricia Ann Herrick.)

Q. Do you have a dining hall in there?

A. Yes, we do.

Q. And a bar? A. Yes.

Q. The bar is on one side and the dining hall on the other? A. Yes.

Q. Sometimes do you work in the dining hall?

A. Yes, I do.

Q. Were you working on the 16th day of July?

A. No.

Q. Were you present in it? A. Yes.

Q. Did you see the defendant?

A. Yes, I did.

Q. Do you recall about what time of the day you saw him in the——

A. About—I couldn't say exactly, but it was around 7:00.

Q. You heard Mr. Thompson's testimony?

A. Yes.

Q. Did you see the defendant pull a gun on Mr. Abernathy, the bartender? A. Yes.

Q. Where were you standing?

A. I was standing just a little behind him, about two feet between Mr. Thompson and Randall, just a little behind him. [10] I could see the gun.

Q. Did you hear the defendant order Mr. Abernathy to serve the woman a drink? A. Yes.

Q. Did you think the weapon was loaded?

A. Yes. I don't know, but I assumed it was the way he was using it.

Q. Did he point the gun at the bartender?

A. Yes.

(Testimony of Patricia Ann Herrick.)

Q. Like he was ready to shoot? A. Yes.

Mr. Buckalew: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. He pointed it at him like that? A. No.

Q. How did he point it at him?

A. He had it waist high, directly at him.

Q. Was no way for you to know whether or not the gun was loaded, was there? A. No.

Q. Did he pay for the drink? [11]

A. I didn't pay too much attention to that.

Q. Don't you recall whether or not he paid for the drink? A. No, I was really scared.

Q. You didn't observe whether or not he paid for the drink? A. No.

Q. Well, can you state positively that he did or did not pay for the drink, either way?

A. I couldn't tell you.

Q. Your memory hazy on that subject?

A. Well, I didn't pay any attention to whether he did or not.

Q. You paid attention to the gun, did you?

A. Oh, yes.

Q. Do you remember how long a barrel it had?

A. Pardon?

Q. Do you remember how long a barrel the gun had? How long was the barrel of the gun?

A. It was short. I could just see the barrel and

(Testimony of Patricia Ann Herrick.)

I would say it was about two inches. I don't know anything about a gun.

Q. Two inches long? A. Yes.

Q. Did you see a gun a little bit ago in the United States Attorney's office? A. Yes.

Q. Now, did you say that the barrel of the gun was about two inches long? [12]

A. I didn't—the only gun I saw was a big gun—I didn't see any little gun.

Q. You say the barrel of the gun you saw was about two inches long, is that correct?

A. Yes.

Q. Are you reasonably sure of that?

A. Yes.

Q. Do you know how long—about how long a foot is? A. Yes.

Q. You know approximately how long a foot is?

A. Yes.

Q. Now, do you know how long an inch is, approximately? A. Yes.

Q. Then you know how long a half an inch is, don't you? A. Yes.

Q. You know that two inches is a good deal longer than a half an inch, don't you?

A. Yes.

Q. About January 19th at Keith and Clara's you and I being present and other persons being present, did you not say in substance as follows: "It was a little tiny gun. The barrel stuck out about a half an inch." Did you not say that at that time and place?

(Testimony of Patricia Ann Herrick.)

A. Well, you asked me—I thought you meant the whole length of the gun. [13]

Q. Well, did you or did you not at that time and place say as follows, exactly——

Mr. Buckalew: Your Honor, I object to this because I don't know what took place and I don't know what questions he propounded to the witness.

Mr. McCutcheon: You will in a few moments, if you give me the time.

The Court: He is laying the foundation for impeachment. Go ahead.

Mr. McCutcheon: Miss Herrick, did you or did you not at that time and place with those persons present say as follows: "He paid for the drink and left"? Did you not say that at that time and place?

A. I don't remember.

Q. Do you recognize your initials when you see them?

A. If I said it on there I probably said it.

Q. Well, which is the true story then, Miss Herrick? The one you are telling now or the one you told on January 19th and signed? Now, answer this question: Did he pay for the drink or didn't he?

A. Well, I don't remember what I said. It has been a long time ago.

Q. Well, do you remember, Miss Herrick, which is the true story whether or not the barrel was two inches long or a half inch long? [14]

A. It seemed to me when you asked me that, you asked how much was showing.

(Testimony of Patricia Ann Herrick.)

Q. How much was showing?

A. About a half an inch. When you asked me how long the barrel was I thought you meant the whole length of it.

Q. How much of the barrel was showing?

A. About a half an inch.

Q. I see. Is that your testimony now?

A. Yes.

Q. Well, what did you mean by your testimony when you said the barrel was two inches long?

A. You asked me how long the barrel was; you didn't ask me how much was showing.

Q. Which is the correct testimony? That you didn't notice whether or not he paid for the drink or that he paid for a drink?

A. I don't remember now.

Mr. McCutcheon: Your witness. One more question.

Q. Did you see a gun in the United States Attorney's office a while ago? A. Yes.

Q. Did the United States Attorney ask you whether or not that was the gun? A. No.

Mr. McCutcheon: No further questions. [15]

Mr. Buckalew: No further questions.

(The witness thereupon withdrew from the witness stand.)

Mr. Buckalew: Call Mr. Abernathy.

PAUL ABERNATHY

called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. Paul Abernathy.

Q. Were you a bartender on duty on the 16th day of July at Keith and Clara's? A. I was.

Q. You recognize the defendant? A. I do.

Q. Will you tell the jury the circumstances under which the gun was drawn?

A. They were over at the lunch counter at first and so they came over to the bar and were getting pretty drunk. I served them one more and they went over to the table and I was watching them pretty close. There were a few people in there at the time and they went outside in a rough way and he took Mrs. Randall out—the blonde woman and——

Mr. Buckalew: Excuse me. Will you talk a [16] little slower and a little louder? I don't believe all the jurors can hear you.

A. So when they was outside they come back in and went over to the lunch counter again, so were sitting over there. I don't know—she came back in crying—I don't know what happened. Came to the bar and asked for a drink. I refused them, so they said, "Give me a drink or going to be trouble," something like that. I am not sure of the words. Anyway, said "Give me a drink." Put his

(Testimony of Paul Abernathy.)

left hand down and throwed the gun on me, and said "Give me a drink." So I served them a drink and he did pay for his drink and they left.

Q. Did he point the gun directly at you?

A. Right straight at me, about three foot away from him across the bar.

Q. Did you think the gun was loaded?

Mr. McCutcheon: Objection. Objected to as an improper question.

The Court: Objection overruled.

Mr. Buckalew: Will you answer the question, please? A. Sir?

Q. Did you answer that question? Did you think the gun was loaded? A. Yes, sir; I sure do.

Q. Would you have served up a drink if he hadn't put the gun [17] on you?

Mr. McCutcheon: Object to it as improper.

The Court: Overruled.

A. No, sir, I wouldn't have served him, either one, if the gun hadn't been thrown on me.

Mr. Buckalew: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. Did you know whether or not the gun was loaded? A. I couldn't tell.

Q. All he said when he pointed the gun at you was that the total words spoken, he said, give me a drink? Nothing else. Is that what he said?

A. No, he said, give us a drink. Those are the words I hear said after I refused him twice.

(Testimony of Paul Abernathy.)

Q. That was all he said when he pointed the gun at you, was give us a drink?

A. That is true.

Mr. McCutcheon: No further questions.

The Court: Do you know whether he pulled the gun out of a pocket or out of a holster?

A. No, sir. Looked like to me under his belt, might have been [18] a little holster. I couldn't swear to it. Swung it about that high (indicating) across the bar right straight at me.

Q. Did he have a coat on, a jacket?

A. Yes, sir, he had a blue coat, a jacket, on.

The Court: That is all.

Redirect Examination

By Mr. Buckalew:

Q. Is that the first time you saw the weapon when he pulled it out? A. Yes, sir.

Q. Concealed up until that time?

A. Yes, sir, it was.

The Court: That is all.

Mr. Buckalew: I was going to ask him another question, your Honor.

Q. Could you tell from looking at it the caliber of the weapon?

A. No, sir, I couldn't. It looked like a 25-caliber to me. I wasn't positive if it was or not.

Q. A small caliber?

A. It was a small caliber.

Q. Did it look like an automatic type?

(Testimony of Paul Abernathy.)

A. Looked like an automatic. [19]

Mr. Buckalew: No further questions.

Mr. McCutcheon: No questions.

(The witness thereupon withdrew from the witness stand.)

Mr. Buckalew: Call Officer Howell.

DON F. HOWELL

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows on

Direct Examination

By Mr. Buckalew:

Q. Will you state your full name, please?

A. Don F. Howell.

Q. Mr. Howell, were you one of the arresting officers in this case? A. Yes, sir.

Q. Do you recall about what time the defendant was arrested or apprehended?

A. The apprehension, I believe, was possibly between 11:30 and 12:00 o'clock on the 16th of July, I believe it was.

Q. Was the defendant driving a car?

A. Not at the time I got there.

Q. Do you recall where he was apprehended?

A. Yes, sir. At the—I believe it is the Stratton Service Station on the right of Spenard Road or where Fireweed Lane meets Spenard Road. [20]

Q. Do you know whether any weapons were taken out of the car?

(Testimony of Don F. Howell.)

A. Yes, sir, there was nine MM German type Luger automatics taken out of the glove compartment of the Buick in which he was riding.

Q. Did you search the defendant's person?

A. Yes, sir.

Q. Find any small automatic on him?

A. No, sir.

Q. Did you observe anything unusual about the defendant's right hand?

A. Yes, sir, there was what appeared to me was a bullet hole through his right ring finger and his little finger.

Q. Did you take a picture of the defendant's hand? A. I did.

Q. Did you bring those pictures?

A. I did.

Q. Do you have them with you?

A. Yes, sir.

Q. Can I see them, please?

(The pictures were then handed to Mr. Buckalew, who in turn gave them to defendant's counsel for examination.)

Mr. McCutcheon: Objected to on several grounds, your Honor. One, no proper foundation has been laid. No. 2—I can't see what that has to do with the crime that this man is charged with. I don't see that that is material and I make the [21] objection on that ground.

Mr. Buckalew: Your Honor, I believe that it is relevant and will show by the circumstantial evi-

(Testimony of Don F. Howell.)

dence that the weapon was loaded because shortly thereafter—I will establish the time—the wound was inflicted in the defendant's hand. I can show by an expert witness that the puncture is of the size of about a 25-caliber.

The Court: Well, do the photographs themselves have any evidentiary value. However, let's see them first.

Mr. Buckalew: I believe they do show the condition of the hand at the time of the arrest. You can see that it was a fresh wound, that the blood is still dripping from, I believe, one of the little fingers.

Mr. McCutcheon: He has everything but the pictures in evidence now.

The Court: Well, these may be marked for identification until there is some evidence introduced as to the size of the holes or what caliber bullet could have caused them.

Mr. Buckalew: Fine, your Honor.

Mr. McCutcheon: Is my objection sustained at this time?

The Court: Well, it is sustained to the offer, yes.

Q. (By Mr. Buckalew): Did you ask the defendant how he got the wound?

A. Yes, sir. [22]

Q. What did he tell you?

A. Stated that he'd hurt his hand on the tailgate of his truck which was later learned to be in Kenai.

Mr. Buckalew: Your witness.

(Testimony of Don F. Howell.)

Cross-Examination

By Mr. McCutcheon:

Q. Were you the one that found the gun in the glove compartment of the automobile?

A. It was one of the officers, yes.

Q. Were you standing there when the gun was discovered? A. Yes, sir.

Q. Did you look at the gun at that time?

A. No, sir.

Q. Was it loaded? A. No, sir.

Mr. McCutcheon: No questions. One more question.

Q. Were there cartridges in the glove compartment?

A. I did not look in the glove compartment myself.

The Court: That all?

Mr. Buckalew: That is all.

(The witness thereupon withdrew from the witness stand.)

The Court: We will recess for five minutes. [23]

(After a short recess Court re-convenes and the following proceedings were had.)

Mr. Buckalew: Call Dr. O'Malley.

JAMES E. O'MALLEY

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Buckalew:

Q. State your full name, please.

A. James E. O'Malley.

Q. Dr. O'Malley? A. Yes.

Mr. McCutcheon: Waive the Doctor's qualifications.

Mr. Buckalew: Doctor, do you recall looking at the defendant's hand sometime around the 16th day of July, 1952? A. I believe I do.

Mr. Buckalew: Could I have the exhibit, please?

(The witness thereupon handed to Mr. Buckalew the exhibit which had been marked for identification, the photographs.)

Q. Will you look at these photographs and see if you can recognize them?

A. Yes, I'd say that was the same hand I looked at.

Q. What type of wound is it, Doctor?

Mr. McCutcheon: Just a moment before you answer that, [24] Doctor. Object to the line of questioning, if the Court please, on the grounds that it does not in any way relate to the crime charged. It has absolutely nothing to do with the crime charged. The man is charged with assault with a deadly weapon. Might the objection show that it is an improper question and irrelevant and immaterial.

(Testimony of James E. O'Malley.)

The Court: For the purpose of showing the caliber or approximate caliber of the bullet which caused the wound, the objection is overruled.

Mr. Buckalew: That's the purpose of it, your Honor.

The Court: Go ahead.

Q. (By Mr. Buckalew): Did you examine the wound, Doctor? A. I did.

Q. Was it made—was it a gunshot wound?

A. If it please the Court, could I tell the circumstances under which I examined this man? This man was brought to me by the Deputy Marshal with no history and had me to look at the hand and asked me what caused that wound, and I said a gunshot wound, probably a 25-caliber weapon.

Q. Did you ask the defendant how he got the wound?

A. He said he got it caught in the tailgate of a wagon.

Q. Wagon? A. Some vehicle.

Q. What did you tell the defendant? [25]

A. I told him he was a liar.

Mr. McCutcheon: Objected to. The question was: What did you tell the defendant?

The Court: He answered and told him he was a liar.

Mr. Buckalew: It was in the presence of the defendant, nothing improper about that. Your witness.

Mr. McCutcheon: Had the witness answered the question, if the Court please?

The Court: Yes.

Mr. McCutcheon: I didn't hear it. No questions.

Mr. Buckalew: The Government rests, your Honor.

(The witness, Dr. O'Malley, thereupon withdrew from the witness stand.)

The Court: You ready to go on with the defense?

Mr. McCutcheon: No, we are not. If the Court please, I would like to have the opportunity at noon time to prepare some proposed instructions. I had not the slightest idea the Government's case would go so quickly. I propose to subpoena some witnesses.

The Court: You can submit the instructions any time before the evidence is closed. You have no witnesses to go on now?

Mr. McCutcheon: I contemplate putting a witness on the stand, but the witness will be subpoenaed for whatever time the Court adjourns to. [26]

The Court: That means you have no witness now that you can put on in your defense?

Mr. McCutcheon: Not that I choose to put on at this time.

The Court: Well, if we adjourn or recess to 2:00, there would not be any difficulty in concluding today, would there?

Mr. McCutcheon: None whatsoever.

The Court: We will recess then to 2:00 p.m.

(Thereupon, at 11:26 o'clock a.m., March 5, 1953, the Court recessed and continued the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., March 5, 1953, counsel for plaintiff and defendant being present and defendant being present in person, the Deputy Clerk calls the roll of the trial jury, each answered to his or hear name, and the trial of said cause is resumed.)

The Court: You may proceed.

Mr. McCutcheon: I have some proposed instructions, if the Court please. May I approach the bench?

The Court: You may submit them. You may call your next witness.

(The proposed instructions were handed up to the Court.)

Mr. McCutcheon: The Government has [27] rested?

The Court: Yes.

Mr. McCutcheon: I would like to recall Mr. David Thompson to the stand, please.

DAVID E. THOMPSON

re-called as a witness on behalf of the defendant, having been previously sworn, testified as follows on

Direct Examination

By Mr. McCutcheon:

Q. Mr. Thompson, you were subpoenaed by the Government to appear here, were you not?

A. I was.

(Testimony of David E. Thompson.)

Q. At the time and place of this alleged incident what were you doing at Keith and Clara's?

A. I was sitting at the end of the bar having a drink.

Q. Which end of the bar—the Seward end or the Anchorage end? A. Seward.

Q. At the very end of the bar were you?

A. Just at the bend in the bar.

Q. You were on Mr. Randall's left?

A. Sir?

Q. You were on Mr. Randall's left?

A. That is right.

Q. To his left? A. That is right. [28]

Q. And he took this gun out of his belt or whatever he had it with his left hand, did he not?

A. That is right.

Q. And you say it was a small gun, was it?

A. Positively.

Q. You saw a Luger in the United States Attorney's office before this trial commenced, did you?

A. I did.

Q. That wasn't the gun, was it? A. No.

Q. But the gun was approximately the size of a small or a 25-automatic, isn't that so?

A. Yes, sir.

Q. That has a very short barrel?

A. Very.

Q. And you, of course, assumed that it was loaded? A. Absolutely.

Q. And I think you testified this morning that you could see that it had the clip in it ready to go?

(Testimony of David E. Thompson.)

A. I did, yes, sir.

Q. You observed that closely, of course?

A. I did.

Q. You also could see the barrel, could you?

A. I could see the barrel and I could also see the butt of the gun when he pulled it out from underneath his trouser belt. [29]

Q. Do you recall my visiting with you on January 19th, at your home out near Keith and Clara's?

A. I do.

Q. And at that time and place and with persons present other than you and I, you made some statements to me, did you not? A. I did.

Q. And signed your name to it? A. I did.

Q. Let me ask you if you did not say on that—at that time and place and with those persons present—he held it so. All I could see was the barrel of the gun?

A. When he was holding it like that.

Q. Did you not make that statement at the time and place?

A. When he was holding it like that, yes.

Q. Answer the question. Did you not make the statement and sign it at the time and place?

A. Yes, sir, I did.

Q. Well, when was it that you remembered seeing the clip in the gun?

A. I remember seeing it at all times.

Q. Including the time of our conversation out there?

A. Yes, but I wasn't asked that question then.

(Testimony of David E. Thompson.)

Q. Well, that was the statement you made, wasn't it?

A. I made the statement that when he held it, all I could see [30] was the barrel of the gun.

Q. He took it out of his belt with his left hand?

A. Right.

Q. Right or left? A. With his left hand.

Q. Right or left?

A. With his left hand. I see it in his left hand.

Q. You are positive of that, are you?

A. That is right.

Q. Do you know a 25-automatic when you see one? A. I do.

Q. And isn't it true that most all 25 automatics are the same size by either American manufacturers or foreign manufacturers? That are all the same size approximately?

A. Pretty close to it.

Q. Nothing unusual about this 25-automatic was there? A. Not a bit.

Q. Did you tell the United States Attorney today that it was a 25-automatic?

A. I don't remember whether I told him today or yesterday.

Q. Had you ever told him prior to that time that it was a 25-automatic?

A. I never talked to him prior to that.

Q. Did he show you the Luger in his office?

A. Yes. [31]

Q. Did he ask you whether or not that was the

(Testimony of David E. Thompson.)

gun? Did he ask you whether or not that was the gun? A. Yes.

Q. What did you tell him?

A. I told him, no.

Q. Now, did any part of the barrel of this 25-automatic stick out beyond his hand?

A. There was only just a small fraction of the barrel could stick out of the frame of an automatic gun of that type.

Q. So when he held it in his hand all you could see was the barrel, isn't that correct?

A. That is right, the frame, rather the frame of the gun.

Q. You could see the frame of the gun?

A. That is right.

Q. And the clip at the bottom?

A. That is right, you could see the clip of the gun when he pulled it out, not when he was holding it like that.

Q. How long did he hold the gun on the bartender?

A. I haven't any idea. I slipped off the stool and went out to get the license number of all the cars in the lot.

Q. Immediately?

A. As soon as I could slip off, yes; it might have been a matter of two or three seconds, still holding the gun on him when I left.

Q. And what did he say to the bartender? [32]

A. Give her a drink.

Q. What else did he say?

(Testimony of David E. Thompson.)

A. That's all I know of.

Q. That's all that you can recall?

A. Prior to that? No, he says, are you going to give her a drink or do I have to whip you.

Q. You sure he said that? A. I am.

Q. What color was the gun?

A. It looked to me like it was either a worn metal or nickel plated.

Q. Nickel plated? A. Yes.

Q. What part of it was nickel plated?

A. All I could see tof it.

Q. You mean bright nickel plated?

A. Well, it wasn't very light in there. You couldn't tell whether it was very bright—light color.

Q. You mean nickel plated it was a bright silver color, is that what you mean? A. Yes.

Q. And was the handle nickel plated?

A. I couldn't see the handle. His hand had the handle covered up. I could just see the bottom of the butt.

Q. When did you see the bottom of the [33] butt?

A. Had it sideways—like that (indicating)—pulled it from underneath his trousers, suit, from underneath the belt.

Q. Was the barrel nickel plated?

A. The frame that was visible was nickel plated.

Q. And you don't know, of course, what color the handle was?

A. Couldn't see the handle, just the bottom of the butt.

(Testimony of David E. Thompson.)

Q. What color was the bottom of the butt?

A. The bottom of the butt looked to me like it was nickel plated.

Q. The bottom of the butt was also nickel plated?

A. All you could see of the butt is just the edge of it where the clip fits in.

Mr. McCutcheon: That is all.

Cross-Examination

By Mr. Buckalew:

Q. Was the gun completely concealed?

A. Completely concealed.

Q. And did he fish it from underneath his belt?

A. That is right. It was not visible until he reached for it and pulled it out.

Mr. Buckalew: I have no further [34] questions.

By Mr. McCutcheon:

Q. Did you look and see if it was or not before he pulled it? (Pause) Did you look to see whether it was or not before he pulled it out?

A. Walking around with his jacket open and nothing in sight.

Q. And you say nothing in sight?

A. Nothing in sight.

Q. You looked to see whether there was on not?

A. I could see there was no gun there.

Mr. McCutcheon: No further questions.

Mr. Buckalew: Call Miss Herrick back to the stand, please.

The Court: Is this going to be an examination all over again like with the witness Thompson? I cannot permit that. It has to be something you overlooked before.

Mr. McCutcheon: Perhaps something has come up with this witness' testimony. When I ask the questions your Honor can rule.

The Court: Very well, I want to call attention to the fact that because we take a recess or something of that sort, it does not give counsel a right to re-examine the witness entirely. [35]

Mr. McCutcheon: I assumed I could go ahead with the witness. I heard no objection out of the Government.

The Court: It makes no difference. If the Court permitted a complete re-examination every time counsel has had a few hours to think about it, we would never get through. It you recall a witness, it has to be for something you overlooked before.

Mr. McCutcheon: Yes, sir, I assure you it will be something that will be new. Call Miss Herrick.

PATRICIA ANN HERRICK

re-called as a witness on behalf of the defendant, having previously been sworn, testified as follows on

Direct Examination

By Mr. McCutcheon:

Q. Miss Herrick, you testified this morning you saw the gun, did you not? A. Yes.

(Testimony of Patricia Ann Herrick.)

Q. What color was it?

A. It was light and shiny.

Q. It was light and shiny?

A. The color was silver.

Q. Silver in color? A. Yes.

Q. Now, do you recall on January 19th, when I visited you out [36] at Keith and Clara's, you made a statement and signed it? A. Yes.

Q. Did you or did you not at that time and place and with you and other persons present, say as follows: It was dark in color. Did you or did you not at that time and place say that?

A. I did, said it was shiny.

Q. Did you or did you not at that time and place?

A. Of course, I did. I remember I signed it, don't remember what I signed.

Q. Are these your initials? A. Yes, sir.

Q. Let me ask you once more. I am going to ask whether or not at that time and place, with you and I and other persons present, you did not make this statement and sign it: It was a little gun; the barrel stuck out about a half inch from his finger. The barrel was lighter than the handle. It was dark in color. Did you or did you not make that statement?

A. I don't remember. I probably did if it was on there.

Q. What was your answer?

A. I probably did if it is on there.

Q. Well, which time are you telling the truth? The time you made the statement or the answer to

(Testimony of Patricia Ann Herrick.)

the question I just put to you a moment ago? [37]

A. Well, I said it was shiny in color.

Q. Was it dark or light?

A. Well, it was kinda two different colors. I mean the top part looked shiny, I remember that—the barrel—I don't remember all of it.

Q. What part did you see?

A. Well, I can't remember now.

Q. Well, can you remember what part of the gun you saw? Did you see any part of the gun?

A. Yes.

Q. What part of it did you see?

A. I saw part of the barrel.

Q. What color was the part of the barrel?

A. Shiny in color.

Q. Was it light or dark? Dark and shiny or light and shiny?

A. It was a kind of silver tone—grayish silver tone.

Q. What else of the gun did you see?

A. I saw a dark part of it.

Q. I beg your pardon?

A. I don't remember what part of it. I don't know anything about guns. I couldn't tell you one part from the other, except the barrel and the handle.

Q. When you made this statement: it was dark in color, what part of the gun had you seen that was dark in color?

A. Probably the bottom of it. [38]

(Testimony of Patricia Ann Herrick.)

Q. Well, do you remember when you saw the bottom of it? A. No, I don't.

Q. Then is the witness that preceded you to the stand mistaken whe he said, it was nickel plated, the bottom of it?

The Court: I don't think there was any testimony of that kind.

Mr. McCutcheon: I beg your Honor's pardon. I believe there was. It would be important, if the Court please, to clear up that point in view of your Honor's comment. It was my recollection that the butt of the gun was also nickel plated.

The Court: What is the question now?

Mr. McCutcheon: I am concerned now about your Honor's comment.

The Court: What is the question?

Mr. McCutcheon: The question was, or the statement of the witness was, that the butt of the gun was dark in color. In answer to my question, which part of it was dark in color, she said the butt. That's an opinion, if the Court please, and your Honor said following that, you didn't recall any such testimony.

The Court: No, I don't recall. You just answer the question the way you remembered yourself, regardless of what anybody else testified. Go ahead and answer it.

Mr. McCutcheon: The last question, I believe, I asked the witness was—was the witness who just preceded you to the [39] witness stand mistaken when he said the butt of the gun was nickel plated?

(Testimony of Patricia Ann Herrick.)

The Court: It is improper for one witness to give an opinion on whether another witness is mistaken, so you will have to ask some other question.

Q. (By Mr. McCutcheon): Was the butt of the gun nickel plated or was it dark in color?

A. I don't remember. All I know it was a gun and I was scared and I wasn't paying any attention.

Q. Just answer me that. You don't remember—was that your answer—I don't remember?

A. I didn't say it was nickel plated.

Q. Just a moment now, was your answer I don't remember? Is that your answer?

A. What question?

Q. I asked you whether or not the butt of the gun was nickel plated and I am asking you now what is your answer to that question. I don't mean to be rude to you but, this is a very serious matter. Now, my question to you was, I believe, was the butt of the gun nickel plated and I think I understood your answer to be: I don't remember. Was that your answer?

The Court: She has answered it half a dozen times.

Mr. McCutcheon: Differently, if the Court please, each [40] time.

The Court: She answered it last that she thought the butt was light or silver in color and the handle a dark color. That is her testimony.

Mr. McCutcheon: That is not my recollection of her testimony. I believe that, your Honor—I believe your Honor's remarks are improper and I take exception to them.

(Testimony of Patricia Ann Herrick.)

The Court: You can take exception to them. It is the Court's duty to protect the witness from so much questioning over one detail.

Mr. McCutcheon: Yes, sir, I am only trying to point out her inconsistent statements and I believe, if you will allow me to have the record read back to you, sir, that her last answer to the last question as to whether or not the butt of the gun was nickel plated, her answer was that I don't remember.

The Court: She has answered it once and that is enough. We are not going into it any more.

Mr. McCutcheon: You may step down, if there are no questions by the Government.

(The witness thereupon withdrew from the witness stand.)

Mr. McCutcheon: Is Mrs. Margaret Martin in the courtroom? The defense rests.

The Court: You may make your opening argument unless you have rebuttal. [41]

Mr. Buckalew: I do not have any rebuttal, your Honor.

The Court: You may make your opening argument then. [42]

* * *

Mr. McCutcheon: If the Court please, I would like to, before your Honor instructs the jury, ask counsel for the [56] Government if he will not stipulate with the defense that the photographs that he attempted to have put in evidence this morning—I think they were marked for identification only—never went into evidence——

The Court: Well, you wish to have them in evidence?

Mr. McCutcheon: That is just about what I was about to ask him, if he will put them in evidence.

The Court: They may be introduced in evidence.

Mr. Buckalew: No objection.

(Whereupon, the Deputy Clerk marks the two photographs of a hand, previously marked for identification, as Plaintiff's Exhibits 1 and 2.)

Whereupon, the Court reads the instructions to the Jury.

The Court: Any exceptions?

Mr. McCutcheon: Did your Honor ask if there were any exceptions?

The Court: Yes.

Mr. McCutcheon: The defendant excepts to the failure of the Court to include Defendant's Instructtions 1 and 2, contend that it is in the clear with the Court's instructions as given. An unloaded gun is not a dangerous weapon within the [57] meaning of the statute in the light of the testimony given. Let's see—I assume that our proposed instructions are filed—if they are not——

The Court: Yes, they are here.

Mr. McCutcheon: Very well, sir.

The Court: The bailiffs may now be sworn.

(Whereupon, the Deputy Clerk swears Thomas Merton and T. L. Langford, as bailiffs in charge of the trial jury.)

The Court: The jury will now retire to the jury room to deliberate on the verdict in charge of the bailiffs.

(Whereupon, the trial jury in charge of Bailiffs Thomas Merton and T. L. Langford retire to the jury room.)

The Court: You may adjourn court to 10:00 o'clock tommorrow morning.

Whereupon at 3:13 o'clock p.m., on March 5, 1953, the Court continued the cause to 10:00 o'clock a.m., on the following day, March 6, 1953. [58]

Whereupon, at 10:00 o'clock a.m., March 6, 1953, the trial jury in charge of their sworn bailiffs, Thomas Merton and T. L. Landford, returned to the courtroom and the following proceedings were had:

The Court: Has the jury reached a verdict?

The Forman: We have, your Honor.

The Court: You may hand it to the bailiff.

Whereupon, the foreman hands the verdict to the bailiff, who in turn hands it to the Court, and the Court hands the verdict to the Deputy Clerk.

Deputy Clerk: (reading)

In the United States District Court for the District of Alaska, Division Number Three at Anchorage

No. 2779 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DON MAURICE RANDALL,

Defendant.

VERDICT No. I

We, the jury, find the defendant guilty of assault with a dangerous weapon as charged in the indictment.

Dated at Anchorage, Alaska, this 5th day of March, 1953. [60]

Signed by Anthony Schnabel, Jr., Foreman.

The Court: Is the bail sufficient in this case?

Mr. Buckalew: I am not familiar with the bail. I think it is $5,000 but I do not know about the bond. I have not checked it and I do not know whether it is sufficient or not.

Mr. McCutcheon: If the Court please, the bail is a cash bail and it is $2500. The defendant has just completed the construction of a hotel in Kenai, he and his wife. It is probably conservatively worth about $40,000.

The Court: Has the clerk any recollection of the form of the bail in this case?

Deputy Clerk: I have not, your Honor, but I can check in a very few minutes.

The Court: You know of your own personal knowledge that it is $2500, cash?

Mr. McCutcheon: Yes, sir, I do.

The Court: Well, I am inclined to think for an offense of this kind that $2500 is too little so I will have to commit the defendant to the custody of the Marshal. The Marshal will take him into custody and the time for sentence is fixed as Mondany morning 10:00 o'clock.

Mr. McCutcheon: Would your Honor fix what your Honor considers a reasonable bail?

The Court: If the bail were doubled the Court would not admit him to bail pending sentence. [61]

Mr. McCutcheon: Very well, your Honor.

United States of America,
Territory of Alaska—ss.

I, Bernice E. Phillips, Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript of the Transcript on Appeal in the above-entitled matter taken by me in stenotype in open Court at Anchorage, Alaska, on March 5 and 6, 1953, and thereafter transcribed by me.

/s/ BERNICE E. PHILLIPS.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11(1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office, dealing with the above-entitled action or proceedings, including the bill of exceptions setting forth all the testimony

taken at the trial of the cause, and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the Judgment filed and entered in the above-entitled cause by the above-entitled court on March 18, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the District of Alaska, Third Division.

[Endorsed]: No. 13934. United States Court of Appeals for the Ninth Circuit. Don Maurice Randall, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: September 28, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13934

DON MAURICE RANDALL,

Appellant,

vs.

UNITED SATES OF AMERICA,

Appellee.

STATEMENT OF POINTS RELIED ON ON APPEAL

Appellant herewith states that on this Appeal he intends to rely upon the following points:

I.

The trial Court erred in denying defendant's Motion, dated February 24, 1953, for postponement or continuance of the trial.

II.

The Court erred in admitting testimony of witnesses, David E. Thompson and Patricia Ann Herrick, that they thought the gun was loaded.

III.

The Court erred in admitting the testimony of Dr. James E. O'Malley concerning the caliber of the gunshot wound in defendant's hand.

IV.

The Court erred in submitting to the jury the crime charged in the Indictment, Assault with Dan-

gerous Weapon, since there was insufficient evidence that the gun was loaded.

V.

The Court erred with respect to its instructions to the jury in the following respects, (a) in failing to give defendant's requested instruction No. 1. (b) In failing to adequately instruct the jury as to the distinction between the crime of Assault with Dangerous Weapon and the included offense of Simple Assault. (c) In failing to instruct on circumstantial evidence.

HENDERSON, CARNAHAN,
THOMPSON & GORDON,

HARRY SAGER,

Attorneys for Appellant.

[Endorsed]: Filed October 3, 1953.